

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 10168 of 2007

For Approval and Signature:

**HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE H.B.ANTANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYANTILAL LALJIBHAI KOTECHEA - Petitioner(s)

Versus

UNION OF INDIA THRO' THE CHAIRMAN & 3 - Respondent(s)

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Appearance :

MR MS RAO for Petitioner(s) : 1,

None for Respondent(s) : 1 - 4.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH

and

HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 17/04/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This petition under Articles 226 and 227 of the Constitution is directed against the judgment and order dated 30.08.2006 of the Central Administrative Tribunal, Ahmedabad in Original Application No. 532 of 2005 whereby the Tribunal rejected the Original Application and declined to stay the departmental proceedings initiated against the petitioner herein, Superintendent of Central Excise Division department of Central Excise and Custom at Jamnagar, during pendency of a criminal case.

2. The petitioner was served with the charge-sheet in the departmental inquiry on 08.12.2003 with the charge that on 14.01.2001, the petitioner was found in possession of cash disproportionate to the known sources of his income. Rs.1,38,500/- was found from the petitioner's Car parked at the Ahmedabad airport. The petitioner was also found to be carrying Rs.10,220/- in his brief case which was lying at the inspector's room at the airport. The petitioner was also found to be having original foreign passport of a UK Citizen at the time of search. The petitioner could not give any satisfactory explanation regarding the possession of the above cash and passport.

3. The Central Bureau of Investigation had already instituted FIR regarding the above incident on 14.01.2001 itself. It appears that some time was taken by the department for granting sanction for prosecution which came to be accorded on 30.01.2004 and accordingly, charge-sheet under Section 477A /34 of IPC read with Sections 109 and 114 of IPC and Sections 13(2) read with 13(1)(d) of the Prevention of Corruption Act came to be submitted before the Criminal Court.

4. In the meantime, the charge-sheet in the departmental inquiry was issued on 08.12.2003. The petitioner filed the reply to the charge-sheet on 05.01.2004 and the disciplinary authority appointed the inquiry officer and presenting officer on 18.03.2004. On 14.08.2005, the petitioner filed the Original Application before the Central Administrative Tribunal challenging continuance of the departmental inquiry alleging that both the departmental inquiry and prosecution are made in respect of the same set of facts, evidence and charges and, therefore, the departmental inquiry be stayed during pendency of the criminal case.

After considering the arguments of both the parties

and after considering the principles laid down by the Apex Court in the case of Hindustan Petroleum Corporation Ltd. Vs. Sarvesh Berry, AIR 2005 SC 1406, the Tribunal has dismissed the Original Application. Hence, this petition.

5. Mr. Rao, learned advocate for the petitioner has vehemently submitted that the allegations and the evidence in both the departmental inquiry and the criminal case are the same. This Court as well as the Tribunal have been granting interim stay of departmental inquiries in many other cases including the order dated 08.07.2005 passed by another Division Bench of this Court in Special Civil Application No. 12595 of 2005.

6. Having heard the learned advocate for the petitioner and having considered the decision relied upon by the Tribunal and also having perused the ad-interim orders passed by this Court in Special Civil Application No.12595 of 2005 filed by this very petitioner challenging continuance of another departmental inquiry against this petitioner during pendency of another criminal case, we are unable to find any infirmity in the order of the Tribunal.

7. The Tribunal has rightly relied upon the following principles laid down by the Apex Court in the case of Hindustan Petroleum Corporation Ltd. vs. Sarvesh Berry, AIR 2005 SC 1406.

“The purpose of departmental enquiry and of prosecution is two different and distinct aspects. The criminal prosecution is launched for an offence for violation of a duty the offender owes to the society, or for breach of which law has provided that the offender shall make satisfaction to the public. So crime is an act of commission in violation of law or of omission of public duty. The departmental enquiry is to maintain discipline in the service and efficiency of public service. It would, therefore, be expedient that the disciplinary proceedings are conducted and completed as expeditiously as possible. It is not, therefore, desirable to lay down any guidelines as inflexible rules in which the departmental proceedings may or may not be stayed pending trial in criminal case against the delinquent officer. Each case requires to be considered in the backdrop of its own facts and circumstances. There would be no bar to proceed simultaneously with departmental enquiry and trial of a criminal case unless the charge in the criminal trial is of grave nature

involving complicated questions of fact and law. There may be cases where the trial of the case gets prolonged by the dilatory method adopted by delinquent official. He cannot be permitted to, on one hand, prolong criminal case and at the same time contend that the departmental proceedings should be stayed on the ground that the criminal case is pending.

12. It is to be noted that in cases involving Section 13(1)(e) of the P.C. Act, the onus is on the accused to prove that the assets found were not disproportionate to the known sources of income. The expression known sources of income is related to the sources known to the authorities and not the accused. The Explanation to Section 13(1) of the P.C. Act provides that for the purposes of the Section, "known sources of income" means income derived from any lawful source and such receipt has been intimated in accordance with the provisions of any law, rules or orders for the time being applicable to a public servant. How the assets were acquired and from what source of income is within the special knowledge of the accused. Therefore, there is no question of any disclosure of defence in the departmental proceedings. In the criminal case, the accused has to prove the source of acquisition. He has to satisfactorily account for the same. Additionally issues covered by

charges 2 and 3 cannot be the subject matter of adjudication in the criminal case.

13. That being the position, the High Court was not justified in directing stay of the departmental proceedings pending conclusion of the criminal charge. As noted in Capt. M. Paul Anthony's case (*supra*) where there is delay in the disposal of a criminal case the departmental proceedings can be proceeded with so that the conclusion can be arrived at an early date. If ultimately the employee is found not guilty his honour may be vindicated and in case he is found guilty the employer may get rid of him at the earliest."

8. From the above decision, it is clear that the Apex Court has made distinction between two categories of cases -

- (1) Where not merely the formal burden of proof but also the onus to prove the charge is on the prosecution/employer.
- (2) Where the onus of proof is on the accused/delinquent.

9. The question of the continuance of a departmental

inquiry during pendency of the criminal case prejudicing the delinquent's case in the criminal trial, may ordinarily arise in cases where not only the burden of proof but also the onus is on the prosecution to prove the offence against the accused. The contention of the delinquent would be that once the delinquent (accused) discloses his defence in the departmental inquiry, the investigating and prosecuting agencies would come to know of such defence and thereupon, at the time of leading prosecution evidence, may put that extra effort to preempt the defence of the accused in the criminal trial. In such a case, if the departmental inquiry takes place before the criminal prosecution, disclosure of any defence by the delinquent at the departmental inquiry will prejudice him in the criminal trial to follow, where the accused otherwise has a right to maintain his silence.

10. This principle will, however, not apply to cases where the onus is on the delinquent (accused), both in the departmental inquiry and also in the criminal trial. Only the employee can explain the sources of the assets found to be in his possession beyond the known sources of his income. Where the charge against the delinquent/accused is of possessing assets disproportionate to the known sources of his

income, the onus is on the delinquent/accused to explain how he came into the possession of such assets. The petitioner has already disclosed his defence in his written statement in the departmental inquiry which he will also have to disclose at the criminal trial. Hence, there is no question of any prejudice being caused to the petitioner in the criminal trial, where also he will be required to disclose the sources of cash found to be in his possession on 14.01.2001.

11. In above view of the matter, it is not necessary to consider the other factors which may also dissuade the Court from staying a departmental inquiry during pendency of the criminal trial – such as delay in the trial attributable to the delinquent (accused), the charge in a criminal trial not being of grave nature involving complicated questions of fact and law. The question of examining the extent of prejudice likely to be caused if the departmental inquiry is permitted to continue after completion of the investigation and submission of the charge sheet before the Criminal Court is also another aspect permitting interesting debate. In the facts and circumstances of the case, however, it is not necessary to dwell on these aspects any further.

12. As regards the order dated 08.07.2005 passed by another Division Bench of this Court in the petition preferred by this very petitioner, the same appears to be an ex-parte ad-interim order merely mentioning therein that, subject to hearing the other side, departmental proceedings against the petitioner were stayed till further orders. It was on perusal of the papers in the criminal case and the departmental proceedings that the Court came to the conclusion that both the criminal case and departmental proceedings were based on the same set of facts, same set of documents and witnesses and therefore, defence of the petitioner was likely to be prejudiced seriously if the departmental proceedings were not stayed. That case appears to fall in the first category enumerated in Para-8 hereinabove. The Hon'ble Supreme Court has also held in various decisions that the question whether the departmental inquiry should be permitted to proceed during pendency of a criminal case is to be decided in the facts and circumstances of each case.

13. For the reasons aforesaid, we agree with the conclusion of the Tribunal that the question of prejudice being caused to the petitioner will not arise in the facts and circumstances of the present case. Hence, the order of the

Tribunal does not call for any interference.

14. The petition is summarily dismissed.

[M.S.SHAH, J.]

[H.B.ANTANI, J.]

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